No. 16-1231

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, on remand after this Court held that conviction for sending threats in violation of 18 U.S.C. 875(c) requires proof of mens rea, correctly construed the elements of that offense.

2. Whether the court of appeals correctly determined that omission of a mens rea element from the jury instructions was harmless in the circumstances of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statute and rules:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 841 F.3d 589. A previous decision of this Court (Pet. App. 27a-83a) is reported at 135 S. Ct. 2001. A previous opinion of the court of appeals (Pet. App. 84a-113a) is reported at 730 F.3d 321. The opinion of the district court denying petitioner's post-trial motions (Pet. App. 114a-133a) is reported at 897 F. Supp. 2d 335. The opinion of the district court denying petitioner's motion to dismiss (Pet. App. 134a-146a) is unreported but is available at 2011 WL 5024284.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2016. A petition for rehearing was denied on January 11, 2017 (Pet. App. 147a). The petition for a writ of certiorari was filed on April 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of transmitting in interstate commerce a "threat to injure the person of another," in violation of 18 U.S.C. 875(c). Pet. App. 2a. The district court sentenced him to 44 months of imprisonment to be followed by three years of supervised release. *Id.* at 93a. The court of appeals affirmed. *Id.* at 85a-113a. This Court granted certiorari, reversed, and remanded. 135 S. Ct. 2001. On remand, the court of appeals again affirmed petitioner's conviction. Pet. App. 1a-26a.

1. After his wife moved out of their home with their two young children, petitioner began exhibiting troubling behavior at the amusement park where he worked. Pet. App. 3a. Supervisors sent petitioner home several times after observing him crying with his head down on his desk. *Ibid.* One of the female employees petitioner supervised filed five sexual-harassment complaints against him. *Ibid.* Petitioner subsequently displayed on his Facebook page a photograph showing himself in costume during the park's Halloween celebration holding a knife to that woman's neck. *Ibid.* The photograph was captioned "I wish." *Ibid.* When his supervisor saw the photograph, petitioner was fired. *Ibid.*

Two days after he was fired, petitioner posted additional violent statements to Facebook. Pet. App. 3a. In one post about his former employer, petitioner stated:

> Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the fuckin' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the

> main attraction. Whoever thought the Halloween haunt could be so fuckin' scary?

13-983 J.A. 332; see Pet. App. 5a. Petitioner was aware that statements on his Facebook page "had scared coworkers." Pet. App. 4a.

Petitioner also posted statements on his Facebook page about his estranged wife. Pet. App. 5a-8a. In one post, he stated: "If I only knew then what I know now . . . I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creek and made it look like a rape and murder." 13-983 J.A. 341; see Pet. App. 5a. And in response to a posting from petitioner's wife's sister about shopping for Halloween costumes with petitioner's children, petitioner wrote: "Tell [petitioner's son] he should dress up as Matricide for Halloween. I don't know what his costume would entail though. Maybe [petitioner's wife's] head on a stick? :-p." 13-983 J.A. 342; see Pet. App. 5a.

In October 2010, petitioner posted the following:

> There's one way to love ya but a thousand ways to kill ya,
>
> And I'm not gonna rest until your body is a mess,
>
> Soaked in blood and dying from all the little cuts,
>
> Hurry up and die bitch so I can bust this nut,
>
> All over your corpse from atop your shallow grave,
>
> I used to be a nice guy, then you became a slut,
>
> I guess it's not your fault you liked your daddy raped you,
>
> So hurry up and die bitch so I can forgive you

13-983 J.A. 344; see Pet. App. 5a-6a. Around the same time, petitioner also posted: "Revenge is a dish that is

best served cold with a delicious side of psychological torture." 13-983 J.A. 355.

Based on petitioner's Facebook posts, his wife sought and received a protection-from-abuse order (essentially, a restraining order) against petitioner from a state court. 13-983 J.A. 148-150; see Pet. App. 6a. The order had a duration of three years (the maximum allowed under state law), and the state court also granted petitioner's wife custody of their children. 13-983 J.A. 149-150. Petitioner attended the state-court hearing, at which his wife testified. *Id.* at 149. In her testimony, she explained that she had seen his Facebook posts and had found them to be threatening. *Id.* at 149, 255.

Shortly after the hearing, friends and family of petitioner's wife informed her that petitioner was still making Facebook posts "about harming [her]." 13-983 J.A. 151. She thus continued to monitor his Facebook page in order to protect herself and her family from any actions petitioner might take based on his posts. *Id.* at 151-152, 157. Just three days after the hearing, petitioner posted the following:

> Did you know that it's illegal for me to say I want to kill my wife?
>
> It's illegal.
>
> It's indirect criminal contempt.
>
> It's one of the only sentences that I'm not allowed to say.
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
>
> I'm not actually saying it.

I'm just letting you know that it's illegal for me to say that.

It's kind of like a public service.

I'm letting you know so that you don't accidently go out and say something like that.

Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

It's an incomplete sentence but it may have nothing to do with the sentence before that.

So that's perfectly fine.

Perfectly legal.

I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal.

Yet even more illegal to show an illustrated diagram.

===[__]=====house

:::::::: ^ ::::::::::::cornfield

::::::::::::::::::::::

::::::::::::::::::::::

::::::::::::::::::::::

##########getaway road

Insanely illegal.

Ridiculously, horribly felonious.

Cause they will come to my house in the middle of the night and they will lock me up.

Extremely against the law.

Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic semper tyrannis.

Id. at 333; see *ibid.* (linking to YouTube video of comedian's similar routine involving the President and stating petitioner's "willing[ness] to go to jail for [his] Constitutional rights"); see also Pet. App. 6a-7a. The post—which included an accurate diagram of the house where petitioner's wife and children were staying—made petitioner's wife "fe[el] like I was being stalked" and "fe[el] extremely afraid for mine and my childrens' and my families' lives." 13-983 J.A. 153; see *id.* at 154.

Roughly a week later, petitioner posted the following on his Facebook page:

Fold up your PFA [protection-from-abuse order] and put it in your pocket

Is it thick enough to stop a bullet?

Try to enforce an Order

> that was improperly granted in the first place
>
> Me thinks the Judge needs an education on true threat jurisprudence
>
> And prison time'll add zeros to my settlement
>
> Which you won't see a lick
>
> cause you suck dog dick in front of children
>
> And if worse comes to worse
>
> I've got enough explosives
>
> to take care of the State Police and the Sheriff's Department
>
> [link: Freedom of Speech, en.wikipedia.org]

13-983 J.A. 334; see Pet. App. 7a-8a. This post caused petitioner's wife to be "extremely afraid for [her] life." 13-983 J.A. 156; see *id.* at 158 ("I was just extremely scared."). She explained that even though she "got the protection order to protect myself and my children," petitioner "was still making the threats for everyone to see." *Id.* at 156.

The next day, petitioner posted on Facebook about shooting a kindergarten class:

> That's it, I've had about enough
>
> I'm checking out and making a name for myself
>
> Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
>
> And hell hath no fury like a crazy man in a Kindergarten class
>
> The only question is . . . which one?

13-983 J.A. 335; see Pet. App. 8a-9a. This post was seen by Federal Bureau of Investigation (FBI) Special Agent Denise Stevens, who had been warned about petitioner by the amusement park and had been monitoring petitioner's public Facebook posts. Pet. App. 91a. After she saw the kindergarten-shooting post, her supervisor notified the local police department, which in turn notified the superintendent of schools. 13-983 J.A. 84-85.

Agent Stevens and another FBI agent went to petitioner's house to interview him. Pet. App. 91a. Petitioner did not cooperate with the agents. *Ibid.* Later that day, he posted the following on his Facebook page:

> You know your shit's ridiculous
>
> when you have the FBI knockin' at yo' door
>
> Little Agent Lady stood so close
>
> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat
>
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb

> Why do you think it took me so long to get dressed with no shoes on?
>
> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!]

13-983 J.A. 336 (brackets in original); see Pet. App. 9a-10a. After reading that post, Agent Stevens "was concerned about [her] family because [she] knew that [petitioner] was computer savvy" and might be able to find out where she lived. 13-983 J.A. 69. She informed her husband of the situation and took extra precautions around her home. *Ibid.*

2. Petitioner was indicted on five counts of interstate communication of threats, in violation of 18 U.S.C. 875(c). Pet. App. 11a. Section 875(c) prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." The counts were based on his Facebook posts: Count 1 alleged threats against patrons and employees of the amusement park, *id.* at 5a; Count 2 alleged threats against his wife (both in the post containing the diagram of the house where she was staying and the post asking whether her protection-from-abuse order was "thick enough to stop a bullet"), *id.* at 8a; Count 3 alleged threats against local law enforcement (in the post about having "enough explosives to take care of the state police and the Sheriff's Department"), *ibid.*; Count 4 alleged threats against a kindergarten class (in the post about "the most heinous school shooting ever imagined"),

id. at 9a; and Count 5 alleged threats against Agent Stevens (in the "Little Agent Lady" post), *id.* at 9a-11a.

At trial, petitioner testified that "he did not intend to make any threats." Pet. App. 11a. "When asked how he thought people might interpret his posts, [he] responded, 'You know, I didn't really care what other people thought.'" *Ibid.* The district court instructed the jury that conviction under Section 875(c) required a finding that petitioner had made a "true threat," which the court defined as follows:

> To constitute a true threat, the statement must communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. This is distinguished from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.
>
> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

13-983 J.A. 301. The court denied petitioner's request for an instruction requiring that the government have proved "that [petitioner] intended to communicate a true threat." *Id.* at 21; see *id.* at 267-269, 303.

The jury convicted petitioner on Counts 2 through 5 (the threats against his wife, local law enforcement, a kindergarten class, and Agent Stevens) and acquitted him of the charge of threats against the patrons and employees of the amusement park. Pet. App. 12a. The

court of appeals affirmed, *id.* at 84a-113a, but this Court granted certiorari and reversed, 135 S. Ct. 2001. The Court held that it "was error" to instruct the jury "that the Government need prove only that a reasonable person would regard [petitioner's] communications as threats." *Id.* at 2012. The Court interpreted Section 875(c) to also contain a "mental state requirement," which could be satisfied by proof that "the defendant transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Ibid.* The Court declined to decide whether the mens rea element could also be satisfied by "a finding of recklessness." *Ibid.*; see *id.* at 2012-2013.

3. On remand, the court of appeals again affirmed petitioner's conviction. Pet. App. 1a-26a. "Based on [its] review of the record, [the court] conclude[d] beyond a reasonable doubt that [petitioner] would have been convicted if the jury had been properly instructed." *Id.* at 26a. It "therefore h[e]ld that the error was harmless." *Ibid.*

a. The court of appeals recognized that, in light of this Court's decision, "Section 875(c) contains both a subjective and an objective component." Pet. App. 14a. The court of appeals viewed the district court's "instruction in this case" to have "properly stated" the objective component, *id.* at 15a n.5, which requires proof "beyond a reasonable doubt that the defendant transmitted a communication that a reasonable person would view as a threat," *id.* at 15a. The court explained, however, that conviction under Section 875(c) would also require (unless recklessness were sufficient) proof "beyond a reasonable doubt that the defendant transmitted a communication for the purpose of issuing a threat or with

knowledge that the communication would be viewed as a threat." *Id.* at 14a-15a; see *id.* at 15a n.4.

The court of appeals rejected petitioner's argument that Section 875(c)'s subjective component requires proof that he "acted with knowledge of *a reasonable person's* interpretation of the speech as threatening." Pet. App. 16a. The court reasoned that the "objective component of Section 875(c)," which "shields individuals from culpability for communications that are not threatening to a reasonable person," dispelled concerns about the possibility of a conviction based on an unreasonable interpretation of a defendant's statements. *Id.* at 15a-16a. The court also explained that petitioner's approach "would render the objective component meaningless." *Id.* at 16a. "Instead of asking the jury whether the defendant's communication was objectively threatening, [petitioner] would ask only whether the defendant believed his communication was objectively threatening." *Ibid.*

b. The court of appeals considered each of petitioner's counts of conviction and concluded that "[t]he record contains overwhelming evidence demonstrating beyond a reasonable doubt that [petitioner] knew the threatening nature of his communications, and therefore would have been convicted absent the error" in the jury instructions. Pet. App. 18a.

On the first count of conviction, the court of appeals determined that "a review of the evidence unequivocally demonstrates the jury would have convicted petitioner were it required to find that he either knew his ex-wife would feel threatened by the posts [relating to her] or that he purposely threatened her." Pet. App. 19a. The court accepted the possibility that, had the mental-state

issue been before the jury, petitioner might have testified to a lack of knowledge that the posts were threatening. *Id.* at 20a. But, quoting this Court's decision in *Rose* v. *Clark*, 478 U.S. 570, 583 (1986), the court of appeals reasoned that an error may be harmless even where the defendant has not "conceded the factual issue on which the error bore," such as where he has "denied that he had [the requisite *mens rea*]." Pet. App. 20a (brackets added by court of appeals). And on the facts here, "even if [petitioner] had contested the knowledge element in his testimony, no rational juror would have believed him." *Ibid.*; see *id.* at 21a. The "graphic nature" of his early posts made it "not at all credible that [petitioner] did not know [that his wife] would interpret them as threats," and his attendance at "the court proceeding at which she sought a restraining order against him" based on those early posts made it "less credible still" that he "remained unaware of his ex-wife's fears as he posted more violent messages" thereafter. *Id.* at 20a-21a.

On the second count of conviction, the court of appeals found petitioner's "violent message stating his intention to detonate explosives near State Police officers and the Sheriff's Department if 'worse comes to worse'" to be, "[i]f anything, * * * a more explicit threat than those he knew had frightened his coworkers and ex-wife" on previous occasions. Pet. App. 22a; see *ibid.* (observing that petitioner "knew that both his coworkers and his ex-wife felt threatened by the violent rhetoric in his previous Facebook posts"). It thus rejected his argument that the outcome would have been different had he testified that he lacked knowledge of their threatening nature. *Id.* at 21a.

On the third count of conviction, the court of appeals found that "[g]iven the understandable sensitivity regarding school shootings in this country, of which [petitioner] was no doubt aware, no rational juror could conclude that [petitioner] did not have the purpose to threaten, or did not know that a reasonable person would feel threatened, when he said he would 'initiate the most heinous school shooting ever imagined.'" Pet. App. 24a. Petitioner's post was "graphic and specific in ways that make it impossible to believe that he was unaware it would be interpreted as a threat." *Ibid.* "He specifically threatens elementary schools in a ten-mile radius, narrows his threat further to kindergarten classes within those elementary schools, and ends his post with a haunting question that suggests he will carry out his threat imminently." *Ibid.*

Finally, on the fourth count of conviction, the court of appeals held that "[n]o rational juror could have found [petitioner] did not have the purpose of threatening FBI agents or did not know his post about FBI agents would be regarded as a threat." Pet. App. 25a. By the time petitioner made his threats against FBI agents, he knew that his former coworkers had felt threatened enough to contact authorities, that his wife had felt threatened enough to obtain a restraining order, and that the FBI had taken his prior threats seriously. *Ibid.* Yet he posted "another violent message" about how he could have slit the agent's throat and that "if the FBI returned, he would detonate an explosive device he had strapped to his body." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 19-30) that the court of appeals misconstrued Section 875(c) by failing to require proof that the defendant understood that a reasonable

person would have regarded his statements as threatening. That claim warrants no further review.

a. When this case was previously before this Court, the Court found "no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication * * * with knowledge that the communication *will be viewed* as a threat." 135 S. Ct. at 2012 (emphasis added). Applying that standard on remand, the court of appeals examined whether a properly instructed jury would necessarily have found that petitioner acted with knowledge that people who viewed his Facebook posts—such as his wife—would interpret them as threatening. See Pet. App. 15a-17a.

The court of appeals correctly rejected petitioner's reformulation of the mens rea element to require "knowledge of *a reasonable person's* interpretation of the speech as threatening," Pet. App. 16a-17a. On that interpretation of Section 875(c), a defendant could send a communication that a reasonable person would in fact interpret as a threat, and with the intent or knowledge that the particular recipient will view it as a threat, but still not violate Section 875(c) because he did not understand that a *reasonable* person would feel threatened. That is not only inconsistent with petitioner's previous position in this Court, see 135 S. Ct. at 2012, but also makes little sense. A defendant's appreciation of how a reasonable person would understand his threat is irrelevant to his culpability for knowingly threatening a particular person who he knew or intended would perceive the statement as a threat.[1]

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[1] Petitioner's argument also presupposes that knowledge, as opposed to recklessness, is in fact required for conviction under Section 875(c). See 135 S. Ct. at 2012-2013 (leaving that question open).

Petitioner's fear (Pet. 25-30) of overbroad liability absent his proposed mens rea requirement lacks merit. The objective component of Section 875(c) already "requires the jury to consider the context and circumstances in which a communication was made to determine whether a reasonable person would consider the communication to be a serious expression of an intent to inflict bodily injury on an individual." Pet. App. 15a. As the court of appeals explained, that requirement "shields individuals from culpability for communications that are not threatening to a reasonable person, distinguishing true threats from hyperbole, satire, or humor." *Ibid.*; see *id.* at 16a. And the additional requirement that the defendant intend or know (or, potentially, be reckless as to) the victim's reaction satisfies this Court's admonition that "wrongdoing must be conscious to be criminal" under Section 875(c). 135 S. Ct. at 2012 (citation omitted). If a defendant makes a communication that is objectively threatening, and he intends or knows that his victim will feel threatened, his wrongdoing is conscious. No additional layer of subjective awareness of how a reasonable person would interpret the statement is necessary. Indeed, such an approach would allow the defendant's understanding of whether a communication is objectively threatening to supplant the jury's findings. Pet. App. 16a. No justification exists

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Under a mens rea of recklessness, which the government has advocated in this case, see Gov't C.A. Br. 24-37, petitioner's testimony at trial, including that he "didn't really care what other people thought," Pet. App. 11a, would conclusively establish mens rea. See Gov't C.A. Br. 35-37.

for allowing the defendant to nullify his own liability for an objectively threatening statement in that manner.[2]

b. Rather than directly engage with the court of appeals' reasoning, petitioner instead shifts his focus to a different argument—namely, that the court adopted an interpretation of Section 875(c) that did not require an analysis of objective reasonableness at all. See Pet. 20-21. Even assuming that argument were properly preserved, it is misconceived.

As a threshold matter, to the extent petitioner is challenging the jury instructions on the objective component of Section 875(c), see Pet. 22 n.6, any such challenge has been forfeited. Petitioner did not specifically challenge the district court's "reasonable speaker" instruction in the charging conference, see 13-983 J.A. 267-269; in his original appeal, cf. Pet. App. 103a n.7 (describing the court's "reasonable speaker" approach); in this Court, see 13-983 U.S. Br. at 19 n.1; or in the court of appeals on remand. See Fed. R. Crim. P. 30(d) (requiring "specific objection" to jury instructions to avoid forfeiture). This Court does not ordinarily entertain claims that were not pressed or passed on below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783,

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[2] Petitioner's claim that the court of appeals' standard creates a "heckler's veto," particular in "the age of the internet and social media, when online speakers often have little control over the communiques," Pet. 25, is unfounded. The court acknowledged that social media may result in widespread distribution of a statement to the public. Pet. App. 17a n.7. But its mens rea standard results in liability only when the defendant knew or intended to threaten the recipients he addressed. *Ibid.* (giving Facebook followers as an example). The court did not suggest that liability would exist based on the reaction of anyone in the world who might become aware of the statement.

788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). It should not do so here.

In any event, both this Court and the court of appeals have, unlike petitioner, understood the instructions in this case as an accurate recitation of the reasonable-person standard for classifying communications as threats. This Court described the instructions as "requir[ing] the jury to find that [petitioner] communicated what a reasonable person would regard as a threat." 135 S. Ct. at 2004; see *id.* at 2011 (stating that petitioner's "conviction * * * was premised solely on how his posts would be understood by a reasonable person"); *id.* at 2012 (stating that instructions require proof "that a reasonable person would regard [petitioner's] communications as threats"). And the court of appeals reiterated that point. It explained that:

> The objective component of Section 875(c) shields individuals from culpability for communications that are not threatening to a reasonable person, distinguishing true threats from hyperbole, satire, or humor. *See Watts v. United States*, 394 U.S. 705, 708 (1969). It requires the jury to consider the context and circumstances in which a communication was made to determine whether a reasonable person would consider the communication to be a serious expression of an intent to inflict bodily injury on an individual.

Pet. App. 15a.

The court of appeals' statement that the instructions at petitioner's trial "properly state[d] the objective component," Pet. App. 15a n.5, reflects a reasonable reading of the instructions to conform to the legal standard articulated in the opinion's text. But more importantly, the court's harmless-error review was directly informed

by its textually stated standard—which petitioner does not challenge—not the particular wording of the jury instruction.

c. Petitioner does not identify any circuit conflict that warrants this Court's review. His assertion (Pet. 21-22) of a conflict relies largely on unpublished decisions and decisions that he acknowledges lack square holdings on the question presented. The only two published decisions he views as conflicting with the decision below are *United States* v. *White*, 810 F.3d 212 (4th Cir.), cert. denied, 136 S. Ct. 1833 (2016), and *United States* v. *Dillard*, 795 F.3d 1191 (10th Cir. 2015). Those decisions frame the reasonable-person inquiry for determining whether a communication should be classified as a threat as turning on the interpretation of a reasonable person receiving the communication, rather than the interpretation of a reasonable speaker assessing the reaction that a recipient would have. See *White*, 810 F.3d at 221; *Dillard*, 795 F.3d at 1199.

As petitioner acknowledges (Pet. 22 n.6), the relevant language in those decisions concerns the objective component of the Section 875(c) inquiry, rather than the subjective component that was the focus of his argument below (and the previous appellate proceedings). In any event, any differences between the reasonable-speaker and reasonable-recipient articulations of the reasonable-person standard are "largely academic because in the vast majority of cases the outcome will be the same under both tests." *Doe* v. *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002) (en banc); see *Planned Parenthood of the Columbia/Willamette, Inc.* v. *American Coal. of Life Activists*, 290 F.3d 1058, 1075 n.7 (9th Cir. 2002) (en banc) (observing that differ-

ent articulations "do[] not appear to matter much because all [circuits] consider context, including the effect of an allegedly threatening statement on the listener"), cert. denied, 539 U.S. 958 (2003). "The result will differ *only* in the extremely rare case when a recipient suffers from some unique sensitivity *and* that sensitivity is unknown to the speaker. Absent such a situation, a reasonably foreseeable response from the recipient and an actual reasonable response must, theoretically, be one and the same." *Doe*, 306 F.3d at 623.

This is not the "extremely rare" case in which the reasonable-speaker and reasonable-recipient articulations lead to different results. See *Doe*, 306 F.3d at 623 ("We have come across no case where such a situation has ever been presented."). Petitioner's communications formed a lengthy and disturbing course of conduct that included specific references to bombings, stabbings, and shootings of particular people and at particular locations. See pp. 4-9, *supra*. The reasonable-recipient formulation leads to the same result as the reasonable-speaker formulation. A reasonable person in the circumstances of a recipient of those communications would interpret them as threats—just like many of the actual recipients (his wife, law enforcement, school officials, and Agent Stevens) did. Any resolution of the purported conflict petitioner raises would not affect the outcome of this case.

2. Petitioner also errs in contending (Pet. 31-40) that the court of appeals' decision on remand applied an incorrect harmless-error standard. The Court recently denied certiorari on a similar issue in *McFadden* v. *United States*, 137 S. Ct. 1434 (2017) (No. 16-679), and it should follow the same course here.

a. The harmless-error standard announced and applied in the decision below was drawn directly from this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which likewise involved review of the omission of an offense element from the jury instructions. See Pet. App. 17a ("For a trial error to be harmless, we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'") (quoting *Neder*, 527 U.S. at 19). Petitioner contends (Pet. 35-39), however, that the court of appeals' approach to harmless error did not properly account for (1) the fact that the jury was told not to consider the omitted element; and (2) the possibility that, had the omitted element been expressly at issue, petitioner would have submitted more or different evidence or argument.

Those contentions do not warrant this Court's review. To the extent petitioner simply contests the court of appeals' application of a correctly articulated standard to the specific facts of his case, his arguments do not warrant certiorari. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). To the extent petitioner argues that one or both of the considerations he identifies would preclude a harmless-error finding as a matter of law, he is mistaken.

The suggestion that omission of an offense element should be deemed prejudicial because it "constricted the jury's thinking on the evidence that was presented" (Pet. 39) cannot be squared with *Neder*. The Court in that case held harmless-error review to be appropriate "in the case of an omitted element" notwithstanding that, in such a case, "the jury's instructions preclude

any consideration of evidence relevant to the omitted element." 527 U.S. at 17-18. The Court explained that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. Like other errors the Court viewed as analogous—such as the "misdescription" of a particular element, *id.* at 10 (citation omitted), or the "erroneous exclusion of evidence in violation of the right to confront witnesses," *id.* at 18—the failure to instruct on an offense element "affect[s] the jury's deliberative process," *ibid.* But where it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"—as the court of appeals found here—no relief is warranted. *Ibid.*

The possibility of additional or different evidence or argument in the absence of the error is likewise not dispositive in the harmless-error analysis. Many types of errors that inherently and specifically affect how a defendant presents or argues his case—such as the erroneous admission of a confession or the erroneous exclusion of impeachment evidence—may nevertheless be found harmless in particular cases. *Neder*, 527 U.S. at 18. It necessarily follows that a defendant cannot foreclose a harmless-error finding through nonspecific assertions, of the sort petitioner makes here (see Pet. 37-38), that his trial presentation might have differed had an error not occurred. The question, instead, is whether, in the particular circumstances of the case, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. Here, the court of appeals determined that even had petitioner testified that he lacked knowledge that his Facebook posts would be perceived

as threats, the contrary evidence—*e.g.*, his awareness that similar previous communications had been interpreted as threats—would have led any rational jury to convict him nonetheless. See Pet. App. 20a-22a, 25a. That fact-bound determination does not warrant this Court's review.

This Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986), confirms the correctness of the court of appeals' approach. That decision addressed harmless-error analysis in the context of a constitutionally deficient instruction on an offense element (there, as here, a mental-state element), *id.* at 574-575, a situation that *Neder* viewed to be akin to an omitted instruction on an offense element, see, *e.g.*, 527 U.S. at 8-9 (citing *Clark*, 478 U.S. 577-578). The Court in *Clark* explained that harmless error analysis "do[es] not turn on whether the defendant conceded the factual issue on which the error bore." 478 U.S. at 583. And it held that "the fact that [the defendant] denied" the mens rea element on which the jury had been misinstructed "d[id] not dispose of the harmless-error question" in the case. *Id.* at 583-584. If, as *Clark* holds, a jury-instruction error may be harmless even when a defendant has *actually* disavowed the requisite mental state, it necessarily can also be harmless when, as is the case here, the defendant merely *might have* disavowed the requisite mental state.

The circumstances of this case, moreover, provide substantial cause to doubt whether petitioner actually would have or could have offered such a disavowal. As the court of appeals observed (Pet. App. 20a-21a), petitioner did offer mental-state testimony at trial, apparently viewing it as strategically advantageous to do so even though the issue would not be directly presented to the jury. But, as the court further observed, although

petitioner denied an intent to threaten, he "never contested that he knew his posts would be viewed as threats." *Id.* at 21a; see *id.* at 11a ("When asked how he thought other people might interpret his posts, [he] responded, 'You know, I didn't really care what other people thought.'"). Petitioner misunderstands the import of that observation when he contends (Pet. 36) that it improperly "shift[ed] the burden to [p]etitioner to establish * * * that he did *not* have the requisite state of mind." The court of appeals expressly recognized the burden to show harmlessness "beyond a reasonable doubt." *E.g.*, Pet. App. 26a. But the fact that petitioner testified about his mental state, yet stopped short of denying knowledge, is evidence that petitioner "did not, and apparently could not, bring forth facts contesting the omitted element," supporting the conclusion that "the jury verdict would have been the same absent the error," *Neder*, 527 U.S. at 19.

b. Petitioner is incorrect in asserting (Pet. 32-34) that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Stanford*, 823 F.3d 814, cert. denied, 137 S. Ct. 453 (2016).

The defendant in *Stanford* was convicted of, *inter alia*, conspiring to distribute a controlled substance analogue. 823 F.3d at 822. While the case was on direct appeal, this Court issued its decision in *McFadden* v. *United States*, 135 S. Ct. 2298 (2015), which clarified the knowledge required for such a conviction. See *Stanford*, 823 F.3d at 822. The Fifth Circuit rejected the argument that the failure to instruct the jury in accord with *McFadden* was harmless error and rejected in particular the argument that ample evidence in the record established that the defendant had the requisite state of

mind. *Id.* at 835. The prejudice determination in *Stanford*, however, is not inconsistent with the decision below here. As this Court explained in *Neder*, the determination of prejudice is often intensely record-dependent and requires a "case-by-case approach." 527 U.S. at 14; see *id.* at 19. The evidentiary record in one case may fall short of satisfying the harmless-error standard while the evidentiary record in a different case may be sufficient; that circumstance is unsurprising and does not suggest that the cases conflict.

Petitioner errs in reading (Pet. 33-34) *Stanford* to preclude a finding of harmless error whenever a defendant asserts that the omission of an offense element from the jury instructions distorted the presentation of the defense. He overlooks that the defendant in *Stanford* argued that the omission of the proper intent requirement from the jury's instructions violated his constitutional rights in two distinct ways: it resulted in his conviction without a finding that one of the elements of the crime of conviction was satisfied, and it prevented him from presenting a complete defense. See 823 F.3d at 828, 836. The portion of the opinion discussing distortion of the trial record, cited by petitioner (Pet. 33-34), addressed the second asserted injury. Petitioner here, however, has not argued—and has therefore forfeited his right to argue—that the instructional error inflicted a distinct constitutional harm by preventing him from presenting a complete defense. The Fifth Circuit's disposition of the complete-defense claim in *Stanford* therefore cannot form the basis of a conflict with the decision below.

Furthermore, the Fifth Circuit has elsewhere applied *Neder* in precisely the way the court of appeals applied it in this case, evaluating whether evidence presented to

the jury on the relevant element was sufficiently "overwhelming" to support a guilty verdict, even when that evidence was contested. See *United States* v. *Skilling*, 638 F.3d 480, 483-488 (5th Cir. 2011), cert. denied, 566 U.S. 956 (2012). Petitioner accordingly provides no basis for concluding that the Fifth Circuit would reach a different result from the decision below on the facts of this case.

c. Additional circuit decisions cited by petitioner (Pet. 34-35) likewise do not conflict with the decision below.

Petitioner first asserts that the Second and Fourth Circuits disagree about whether, when an offense element was omitted from the jury instructions but contested by the parties, a finding of "sufficient evidence to permit a jury to find in favor of the defendant on the omitted element" in itself precludes a determination that the error was harmless. Pet. 34 (citation omitted). This case, however, does not implicate any such disagreement, because the court of appeals did not make any finding that the evidence was sufficient to permit the jury to decide the mens rea issue in petitioner's favor. Instead, it found the opposite. See, *e.g.*, Pet. App. 20a, 25a (concluding that the evidence would not have supported a finding in petitioner's favor even if he had fully contested the knowledge element).

Petitioner also asserts (Pet. 35) that the Ninth and Eleventh Circuits disagree about whether, when an offense element was omitted from the jury instructions but contested by the parties, the error should be treated as "essentially *per se* harmful." But petitioner is incorrect in interpreting the Ninth Circuit's decision in *United States* v. *Guerrero-Jasso*, 752 F.3d 1186, 1193-1195 (2014), to require such treatment. The court in

that case declined to find that judicial factfinding in violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), was harmless in circumstances where the defendant had the ability to raise a "meaningful" challenge "to the authenticity of the government's evidence." *Guerrero-Jasso*, 752 F.3d at 1195; see *id.* at 1189. The decision included a statement that "[w]here, as here, there was no trial but a guilty plea, and * * * evidence is introduced post-conviction by the government only to demonstrate harmlessness, it would fundamentally undermine the *Apprendi* protections *to require* the defendant affirmatively to present evidence to counter facts that were never properly established in accord with *Apprendi* in the first place." *Id.* at 1195. The court did not, however, purport to hold that the omission of a contested offense element from a jury instruction should always be considered prejudicial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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